UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/536
29 October 1991

ENGLISH
ORIGINAL: FRENCH

ADMINISTRATIVE TRIBUNAL

Judgement No. 536

Case No. 605: KRAVCHENKO

Against: The Secretary General of the International Civil Aviation Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, First Vice-President; Mr. Ahmed Osman, Second Vice-President;

Whereas, on 18 June 1991, Youri Andreevich Kravchenko, a staff member of the International Civil Aviation Organization, hereinafter referred to as ICAO, filed an application containing the following pleas:

"II. Pleas:

1. As a preliminary measure the Applicant requests the President of the UNAT [United Nations Administrative Tribunal] to request the Respondent to continue the employment of the Applicant until such time that the Tribunal has ruled on the case;

2. The Applicant seeks to obtain a renewal of his contract as P-4 Language Officer at the International Civil Aviation Organization. He submits that the Respondent should have renewed his contract in accordance with article 59 of the Chicago Convention, the ICAO Staff Regulations and Rules, the relevant general principles of International Law as reflected in the Charter of the United Nations as well as his own record of his satisfactory employment with the Organization.

...

The Tribunal is also requested to:

1. Order the Respondent to provide the Applicant with a contract of employment following standard ICAO procedures;

2. Order payment to the Applicant of salary lost and related costs incurred during the period of unemployment between the expiry of his contract and the reconstitution of employment;

3. In the event of compensation being paid in lieu of reappointment, the Applicant requests the granting of award in the amount of three years net salary."

Whereas the Respondent filed his answer on 11 July 1991;

Whereas, on 2 September 1991, the Applicant filed written observations in which he requested the Tribunal:

> "to decide in the affirmative and to order his reappointment as P-4 Language Officer retroactively from 29 June 1991 together with compensation for actual costs incurred as a result of the termination of the appointment.
>
> In the event of compensation being paid in lieu of reappointment, the Applicant requests the granting of award in the amount of three years net base salary."

Whereas, on 11 and 13 September 1991 respectively, the Respondent and the Applicant submitted additional information at the request of the Tribunal;

Whereas the Respondent provided additional documents on 3 October 1991 at the request of the Tribunal;

Whereas the facts in the case are as follows:

On 12 February 1986 the Secretary General of ICAO informed the Representative of the USSR on the Council of ICAO of his intention to offer a fixed-term appointment as Language Officer to the Applicant, a national of the USSR; pursuant to the provisions of paragraph 3 of Resolution A14/6 of the ICAO Assembly ("In cases where it is desired to recruit a person from the Government Service of a Contracting State, the Secretary General shall take all practical steps to obtain the consent and co-operation of that

State and, if appropriate, its advice as to the suitability of the person for the position in question"), he requested "the consent of your Government to extend this offer and your cooperation in facilitating the early release of Mr. Kravchenko." On 13 February 1986 the Representative of the USSR informed the Secretary General that his Government had agreed to the offer. On 19 February 1986 a cable was sent to the Applicant offering him a three year fixed-term appointment and asking him to cable whether he accepted in principle. On 28 February 1986 the Representative of the USSR informed the Chief of the Personnel Branch that the Applicant had agreed to the terms of the appointment. By a letter dated 11 March 1986 the Applicant was formally offered a fixed-term appointment for three years at the P-4 level as a Language Officer (Interpreter/Translator) in the Russian Section, Language Branch, Bureau of Administration and Services. He signed the letter of appointment on 18 March 1986 and entered on duty on 6 June 1986.

On 18 November 1988 the Secretary General informed the Representative of the USSR of his intention to offer to the Applicant a further appointment of one year from 6 June 1989; he again requested the consent of the Government of the USSR under paragraph 3 of Resolution A14/6 of the ICAO Assembly. On 14 December 1988 the Representative of the USSR informed the Secretary General that his Government had agreed to the offer and was releasing the Applicant for another year up to 5 June 1990. A letter of appointment was prepared accordingly and the Applicant signed it on 14 February 1989. The same procedure was followed for the further appointment of the Applicant for one year from 6 June 1990 to 5 June 1991.

On 14 January 1991, in a memorandum addressed to the Secretary General of ICAO "to present ... the position of the USSR Administration concerning further implementation of the principle of rotation of the Soviet staff in the Russian Section of the ICAO Secretariat", the Representative of the USSR stated:

> "The USSR Administration has continuously been taking steps to submit in a timely manner qualified candidates with adequate experience to fill vacancies in the Russian Section. In respect of appointments for USSR citizens in ICAO the USSR Administration follows the principle of secondment or Government release which is given for a certain period of time and ensures rotation of Soviet specialists."

He noted that in 1991 the "Government release" would expire in respect of eight staff members of the Russian Section - including the Applicant -, who would return home upon termination of their contracts, and he announced that the qualified candidates to replace those staff members had been selected. On 18 January 1991 the Representative of the USSR submitted the name of a candidate to replace the Applicant in the post of Interpreter/Translator in the Russian Section to be vacant in June 1991.

On 9 April 1991 the Applicant sent to the Secretary General a memorandum in which he requested to continue in the service of ICAO beyond the date of expiry of his appointment; his memorandum read in part as follows:

> "1. ... My present contract will expire on June 6, 1991. In respect to my present contract I never received decision regarding termination or any offer to continue to serve. Only by chance did I find out that a vacancy notice concerning my post was released by the Organization while I was on home leave. It is my understanding that the procedure called 'secondment' was applied to my case.
>
> 2. I have recently learned through FICSA [Federation of International Civil Servants Associations] newsletters and the ICAO Staff Association Bulletin that, by virtue of the Presidential Decision of 12 October 1990, further confirmed by the USSR Governmental Ordinance 1280 of 15 December 1990, Soviet nationals, effective 1 January 1991 are no longer subject to the 'secondment' arrangement. I believe that my personal case does not differ in any way from the other cases now under consideration.
>
> ..."

On 25 April 1991, in a memorandum addressed to the Secretary General, the Chief of the Personnel Branch commented on the "change in secondment policy regarding Soviet language staff at the United Nations" and various specialized agencies; he concluded that the Applicant's request could only be decided on after the Secretary General had taken a policy decision on the secondment issue. On 15 May 1991 the Applicant reiterated his request. On 17 May 1991 the Secretary General informed the Applicant that he was unable to offer him another appointment but that he was prepared to extend his current appointment until 28 June 1991. On 23 May 1991 the Applicant, while accepting the offer of an extension, requested the Secretary General to

review his decision; since he intended to appeal a negative decision, he further requested a suspension of the decision during appeal and the Secretary General's consent to direct submission of an application to the Tribunal. In a reply dated 31 May 1991, the Secretary General maintained his decision, declined to suspend it during appeal and agreed to direct submission of an application to the Tribunal. On 18 June 1991 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The refusal by the Respondent to renew the Applicant's contract was illegal because the Applicant was not given any consideration or explanation.

2. The Applicant was not given the true reason for the denial of further employment, which is a confidential and unwritten agreement between ICAO and the USSR Government concerning the recruitment of staff in the Language and Publications Branch.

3. The Respondent's decision was arbitrary, based on considerations contrary to and in conflict with the Chicago Convention, the ICAO Staff Regulations and Rules and general principles of international law, and constituted an abuse of power.

4. Non-observance by the Respondent of his obligations under the Chicago Convention and the ICAO Staff Regulations and Rules and the relevant principles of international law constituted discriminatory treatment of the Applicant as compared to other, non-USSR, ICAO staff members.

5. In the absence of a secondment agreed to by all parties in conformity with the principles reaffirmed in Judgement No. 482, the Respondent cannot legally rely on decisions by a government to justify his own action with regard to the employment of the Applicant.

Whereas the Respondent's principal contentions are:

1. The terms and conditions of the Applicant's contract of employment have been fully observed.

2. In taking the decision contested by the Applicant, the Secretary General took all relevant factors into account, in particular the official release of the Applicant by the USSR Government. The Secretary General

neither violated the ICAO Staff Regulations and Rules nor took a decision which could be deemed as arbitrary or constituting an abuse of power.

The Tribunal, having deliberated from 21 to 29 October 1991, now pronounces the following judgement:

I. The Applicant, a national of the USSR, entered the service of ICAO in 1986 with a three-year fixed-term contract. This contract was renewed in 1989, 1990 and 1991, and expired on 28 June 1991. On 9 April 1991 the Applicant requested that his contract be renewed. The request was not granted. The final decision refusing to renew the contract was taken by the Respondent on 31 May 1991. This is the contested decision.

II. The Respondent does not contest the Applicant's qualifications. He bases his decision mainly on legal grounds. According to resolution A14/6 of the ICAO Assembly, "in cases where it is desired to recruit a person from the Government Service of a Contracting State, the Secretary General shall take all practical steps to obtain the consent and co-operation of that State". Pursuant to that provision, the Secretary General requested the consent of the USSR Government to the renewal of the Applicant's contract. He did not obtain that consent. The Secretary General considered that he was therefore not able to renew the contract.

III. The Tribunal considers that the provision invoked by the Respondent applies both to the recruitment of ICAO personnel and to the renewal of their contracts.

IV. However, according to the actual wording of paragraph 3 of resolution A14/6 of the ICAO Assembly, the person concerned must be "from the Government Service of a Contracting State".

The Applicant contends that when he entered the service of the Organization he ceased to belong to a governmental organization or a public institution or enterprise of the USSR. He indicates that on the date when he requested the renewal of his contract he was not in the government service of the USSR. At no time did the Representative of the USSR to ICAO

inform the latter of any arrangements made to find the Applicant a post or to reinstate him in his former post when he returned home at the end of his contract.

The Respondent was therefore not able to determine that the Applicant was indeed in the government service of the USSR when he requested a new contract.

V. In view of all the information in the file, the Tribunal considers that at the time when the Applicant requested the renewal of his contract he was not in the "Government Service of a Contracting State" in the sense of paragraph 3 of resolution A14/6 of the ICAO Assembly. The Respondent was therefore not obliged to request the consent of the USSR Government in order to proceed with the renewal of the contract. By requesting such consent and basing his decision on the USSR Government's refusal to give its approval, the Respondent committed an error of law.

VI. The Tribunal considers that this error of law vitiates the decision taken. However, the Tribunal in no way questions the good faith of the Respondent, who was faced with a complex and confusing situation. In this instance, the Respondent was required under article 59 of the Chicago Convention to determine independently, in the interest of the Organization, whether the Applicant's contract should be renewed.

VII. There is no doubt that the Applicant's status was not the same as that of personnel seconded by their Governments. The Tribunal has defined in its jurisprudence the conditions for such secondment and they have not been satisfied in this instance.

VIII. Article 58 of the Chicago Convention states that the ICAO Assembly may determine the status of the personnel by its rules. It further states that the Council of the Organization shall determine, subject to those rules and to the provisions of the Convention, the method of appointment and of termination of appointment, the training, and the salaries and conditions of service of the personnel. Article 59 of the Chicago Convention stresses the

international character of the responsibilities of the personnel. The Tribunal emphasizes that it does not wish to weaken those provisions by this judgement.

IX. Similarly, the application of paragraph 3 of resolution A14/6 is not affected by this judgement, provided that the candidate for recruitment to the international civil service is in the government service of a Contracting State and has not left the service of his Government.

X. The Tribunal considers that the error committed by the Respondent entails his responsibility and entitles the Applicant to compensation.

XI. For the foregoing reasons, the Tribunal:

1. Decides that the Secretary General of ICAO shall pay the Applicant, as compensation, his salary and related allowances from the date when his service ended until 31 December 1991 or until the date on which the Secretary General takes the decision referred to in paragraph 2 below, if this decision is taken before 31 December 1991.

2. Invites the Secretary General to re-examine the Applicant's request for renewal of his contract, to inform the Applicant of his decision before 31 December 1991, and also to inform the Tribunal of that decision.

3. Rejects all the other pleas of the Applicant.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN
First Vice-President

Ahmed OSMAN
Second Vice-President

New York, 29 October 1991

Jean HARDY
Acting Executive Secretary